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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-880

HENRIETTA PALOMARES,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

BLACKMAN PLUMBING COMPANY, ED BLACKMAN, LESTER BLACKMAN, CONSOLIDATED AIR CONDITIONING COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Real Parties in Interest.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

Petitioner Henrietta Palomares seeks a review of the decision of the Workmen's Compensation Appeals Board of the State of California after a denial of Petition for Writ of Review by the Court of Appeal of the State of California, Second Appellate District and after denial of a Petition for Hearing by the Supreme Court of the State of California by way of a Petition for Writ of Certiorari to said Court of Appeal. Respondent Pacific Employers Insurance Company (a real party in interest but not listed in the caption), opposes said Petition for the following reasons:

Petitioner has raised a controversy involving the constitutionality of California Labor Code Section 5406 which prescribes the time in which a dependent of a

deceased worker may bring an action before the California Workmen's Compensation Appeals Board for death benefits provided elsewhere in the California Labor Code.

The controversy relates specifically to a situation wherein, allegedly, the worker died as the result of an occupational disease. The California Labor Code provides that a living worker who sustains an injury as a result of an occupational disease must bring his action for workmen's compensation benefits (disability indemnity and/or medical treatment) within a year of the date upon which he first suffered disability from the disease and either knew or in the exercise of reasonable diligence should have known that such disability was caused by his present or prior employment. On the other hand the California Labor Code provides that an adult competent dependent of such a deceased worker must bring an action for death benefits within one year of the date of death (or within 240 weeks of the date of injury where there is an injury during the worker's lifetime and such injury results in death).

In the instant case apparently the death occurred without known injury prior to death. Petitioner instituted her action for death benefits several years after the date of death. In effect the petitioner urges that the limitation period for her cause of action should be one year from the date of death or one year from the date she either knew or in the exercise of reasonable diligence should have known that such death was caused by the decedent's employment, whichever is later.

As the law does not so provide, petitioner urges that: 1. There is an unconstitutional classification so that she has been denied equal protection of law and,

2. As her cause of action was cut off before her right to death benefits accrued she has been unconstitutionally deprived of property without due process of law.

Neither of these constitutional issues were raised before the courts below or before the California Workmen's Compensation Appeals Board.

Respondent herein objects to the record designated by petitioner. It is not the entire record.

Petitioner Did Not Raise a Federal Question Before the California Courts.

In *Levy v. San Francisco Superior Court,* (1897) 167 U.S. 175, 17 S.Ct. 769, 42 L.Ed. 126 at page 177, the petitioner therein argued that the enforcement of Sections 1458 to 1461 of the California Code of Civil Procedure was a denial of the equal protection of the law. The Supreme Court noted that the record does not show that the petitioner made any such claim in the state court. At pages 177 to 178 the Supreme Court, quoting *Oxley Stave Co. v. Butler County,* 166 U.S. 648 stated:

> "The jurisdiction of this court to reexamine the final judgment of a state court cannot arise by inference, but only from the averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

At page 5 petitioner states that she:

> "Raised substantial questions of federal violation by alleging that Labor Code Section 5406, as applied in the case at bar, was 'constitutionally impermissible,' 'contrary to law', 'substantively and procedurally unconstitutional', and that a

> lack of finding that there was no knowledge of industrial causation available to appellant (sic) or to the medical profession invalidated the judgment."

It is patent that these statements are not distinct and positive averments of a Federal question. However, when these statements are considered in their context it even becomes more clear that no Federal question was raised in the courts below.

Petitioner's brief before the California Supreme Court and the Court of Appeal contains the following headnote:

> *"APPLICATION OF LABOR CODE SECTION 5406 IS CONSTITUTIONALY* (sic) *IMPERMISSIBLE."*

In the body of the discussion under this point appears the following:

> "The lack of findings relative to the nature of employment injury and knowledge of occupational disease constitutionally invalidated the judgment for want of due process."

Nothing else in the argument bears on any constitutional issue. This statement is a far cry from a contention that Labor Code Section 5406 in its application to her case serves to deprive her of property without due process of law.

Petitioners's brief below contains the following headnote:

> *"RATIONALE LABOR CODE SECTION 5406 IS CONTRARY TO LAW WHEN APPLIED TO THE CASE AT BAR."*

There is nothing at all in the discussion that follows this headnote that bears upon any Federal question.

Respondent is unable to find the phrase "substantively and procedurally unconstitutional" in petitioner's brief below. It is difficult for respondent to perceive what the statement: "that a lack of finding that there was no knowledge of industrial causation available to appellant (*sic*) or to the medical profession invalidated the judgment." has to do with due process and equal protection of the law.

Respondent will concede that the following statement appears in the discussion under the headnote:

> *"THE LEGISLATIVE CONSTITUTIONAL CLASSIFICATION IN THE RUIZ CASE IS DISTINCT."*
>
> "Prior to a decade ago, the art in medical and other inexact sciences was such that tools to enable disclosure or causation of many occupational illnesses were unknown. There was no reasonable hypothesis upon which to base a constitutional demand for 'equal protection of the law' of a disease not known to be industrially caused, as compared with those illnesses which were of definite diagnosis as being industrially related, for which disability payments had been or could be made because of definiteness."

The foregoing is certainly not a contention that California Labor Code Section 5406 as applied to petitioner's case has deprived her of equal protection of law.

In view of these vague references in petitioner's brief before the courts below, how can it be said that the California Supreme Court or the California Court of Appeal actually decided a Federal question?

California Labor Code Section 5406 Does Not Create an Unconstitutional Classification of Persons and Thus Operates to Deny Petitioner or Persons Similarly Situated Equal Protection of the Law.

California Labor Code Section 5406 reads as follows:

> "The period within which may be commenced proceedings for the collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of Part 2 of this division is one year from:
>
> (a) The date of death where death occurs within one year from date of injury; or
>
> (b) The date of last furnishing of any benefits under Chapter 2 of Part 2 of this division, where death occurs more than one year from the date of injury; or
>
> (c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.
>
> No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

California Labor Code Section 5412 reads (prior to 1973 amendment) as follows:

> "The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment."

Petitioner herein seems to be arguing that because, pursuant to California Labor Code Section 5406 she

has only one year to perfect her claim, whereas a living worker pursuant to California Labor Code Section 5412 has until a year after he discovers that his disability was due to his employment, there is an unconstitutional discrimination between persons of the same class, that is, between a living worker and an adult competent dependent of a deceased worker.

California Labor Code Section 5412 is an outgrowth of a California Supreme Court decision in *Marsh v. Ind. Acc. Com.*, 217 Cal. 338, 19 P.2d 933, 86 A.L.R. 583.

After a lengthy analysis at page 351 of the official report the court states:

> " 'From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis, it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment. . . . In order to justify an award for disability or death due to an occupational disease, there must always be established an unbroken causal connection between the injury and the employment or the condition under which the employee is required to carry on his work. The connection must be such as to show that the disease or injury was proximately

> caused by the employment or the conditions of work; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in determining the merits of a claim for compensation or death benefits.' "

In the foregoing it can be seen that the court was concerned with the problem that where an occupational disease is incipient during the course of exposure it may not become full bloom until years later and even then may take some time before the relationship of the disability to some employment is established. However, after disability occurs then due diligence must be exercised by the worker to discover any relationship to his employment. When the relationship is established the worker then has one year to perfect his claim. When death ensues before discovery of any employment relationship then the dependent competent adult has one year to file a claim.

Whether Labor Code Section 5406 is a statute of limitations is open to question. In *Ruiz v. Ind. Acc. Com.*, 45 Cal.2d 409, 289 P.2d 239 at page 414 the California Supreme Court, with reference to this section, stated:

> "Accordingly the time limitation appears to be not a normal statute of limitations, but rather to be in the nature of a qualifying condition in the exercise of any right to any death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied."

If it is a true statute of limitations then as to all persons in petitioner's position, all that is required is that the period be reasonable. In *Chase Securities Co. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628, re hearing denied, 325 U.S. 896, 65 S.Ct. 1569, ... L.Ed. 2006, at pages 313 to 315 the Supreme Court stated:

> "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments. Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the costs from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through

the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of reasoning of *Campbell v. Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote: 'Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make

> out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U.S. 518, 523, 524. But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.' *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033. This statement was approved and followed by the New York Court of Appeals in *Robinson v. Robins Dry Dock Co.*, 238 N.Y. 271, 144 N.E. 579."

While there seems to be a clear distinction between a class composed of a living worker and a class composed of dependents of a diseased worker it would also seem that death opposed to disability is a significant distinction. Furthermore, during the lifetime there is not the problem of the staleness of the claim whereas after death there is.

It is apparent from a review of *Ruiz v. Ind. Acc. Com., supra*, that the California Legislature must have been considering stale claims when Labor Code Section 5406 was amended to read in its present form in 1947.

This different legislative classification must be palpably unreasonable before such classification would be overturned (*Los Angeles v. So. Cal. Telephone Co.*, (1948) 32 Cal.2d 378, 392. 196 P.2d 773. Also see *Asbury Hospital v. Cass County*, (1945), 326 U.S. ...., 66 S.Ct. 61, 65, 90 L.Ed. 6, 13; *McGowan v. Maryland*, (1961) 366 U.S. 420, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399).

Petitioner Has Not Been Deprived of Property Without Due Process of Law.

Petitioner appears to be arguing that since Labor Code Section 5406 in allowing only one year for the filing of claim for death benefits, she is prevented from later discovering the cause of death and hence has lost her cause of action before it accrued.

In *Ruiz v. Ind. Acc. Com., supra*, 45 Cal.2d 409, 289 P.2d 229, *supra*, at page 414, the California Supreme Court considered a somewhat similar argument and stated: "Petitioner claims that the application of the statute so as to cut off any right to death benefits before it accrues would be unconstitutional as a deprivation of property without due process of law." (U.S. Const., Fourteenth Amend.; Cal. Const., Art. I, Section 13.) "However her right to recover death benefits is wholly statutory, and her constitutional objection has no bearing on issue."

The California Supreme Court may have been referring to the fact the cause of action for wrongful death was unknown at common law and therefore any statutory provisions for such action must be strictly adhered to. The same rationale applies to provisions for death benefits for the dependents of the deceased workers.

The argument that the petitioner's cause of action is lost before it arises is not really relevant. It is the deceased's cause of action which never arises. Petitioner's cause of action, if any, arises at the date of death.

Conclusion.

There is a rational distinction between the events prescribed for the beginning of the running of the statute of limitations in occupational diseases as between a living worker and a surviving dependent. There is good reason for the concept of the due diligence in the one instance and of no diligence in the other instance. Moreover, a legislative classification should not be easily overturned.

In any event, as petitioner has not properly preserved her constitutional questions in the lower courts, she has no standing in this court.

For all the foregoing reasons it is submitted that the Petition for Writ of Certiorari should be denied.

Dated: February 14, 1975.

ZONNI, GINOCCHIO & TAYLOR,
By MARCO J. ZONNI,
Attorneys for Respondent.